

MEMORANDUM

TO: Sarah LoPresti
FROM: [law student (KH)]
RE: Due Process - Delay of Trial/Decision/Findings
DATE: February 2020

QUESTION PRESENTED

Can a trial court's delay in holding trial, finishing trial, or issuing a finding violate a parent's due process rights?

BRIEF ANSWER

Such a delay may rise to the level of a due process violation if the parent can show that (a) the delay was unreasonable and prejudicial to the outcome of the case, (b) the parent did not contribute to the delay, and (c) the parent took steps to mitigate the delay whenever possible.

ANALYSIS

I. Massachusetts

A. *Delays in Proceedings May Violate Parents' Due Process Rights*

When the Commonwealth "seeks to terminate parental rights, it must do so in a matter that meets the requirements of the due process clause." *Adoption of Edmund*, 50 Mass. App. Ct. 526, 529 (2000). The parent must be afforded the opportunity to be heard "within a meaningful time." *Department of Public Welfare v. JKB*, 379 Mass. 1, 4 (1979).

According to Massachusetts Juvenile Court Standing Order 2-18, care and protection and termination of parental rights trials are to occur twelve to fifteen months after the filing of the petition. Pursuant to Standing Order 1-10, all care and protection and termination of parental rights trials are to conclude no later than thirty calendar days after commencement of trial. An adjudication that a child is or is not in need of care and protection, an order terminating parental

rights, or a decision not to terminate parental rights shall be made no later than thirty days after the close of evidence. *Id.*

If the Justice presiding over the trial needs an emergency extension of his or her deadlines, he or she may request approval from the Chief Justice to extend the time for trial, adjudication, order, or decision for an additional fifteen calendar days. *Id.* This request should identify the extraordinary circumstances that necessitated the request and should be submitted no later than ten calendar days prior to the expiration of the thirty-day period. *Id.* Standing Order 2-18 states that the purpose of the time standards is to “provide guidelines for application in the great majority of cases; it being understood that, as a matter of discretion in specific situations, a judge may extend time periods and vary requirements in the interest of justice.”

A trial conducted over a lengthy period of time with long delays between trial dates does not automatically violate a parent’s due process rights. *Care and Protection of Three Minors*, 392 Mass. 704, 705 n.3 (1984). In *Care and Protection of Three Minors*, the SJC criticized a trial that spanned seventeen months, noting that once a trial begins it should proceed expeditiously to completion and that the parties involved benefit from increased continuity. *See id.* at 705 n.3. However, the due process issue was not raised by the appealing parties or discussed in the written opinion. *See id.* at 705 n.3.

In *Petition of the Department of Social Services to Dispense with Consent to Adoption*, the SJC noted the four-year delay from the initial petition to the termination of parental rights. *Petition of the Department of Social Services to Dispense with Consent to Adoption*, 391 Mass. 113, 118 n.7. There, too, the SJC made no mention of a due process challenge to the delay. *Id.* at 118 n.7.

Although a lengthy proceeding does not necessarily violate a parent's due process rights, "an extraordinary and prejudicial delay in custody proceedings, not attributable to the parents, in some circumstances could rise to the level of a violation of due process." *Care and Protection of Martha*, 407 Mass. 319, 330 (1990). To succeed on such a claim, the parent must show the delay was unreasonable. *Id.* at 331. The parent must also show that he or she was prejudiced by the delay. *Adoption of Don*, 435 Mass. 158, 170 (2001).

The appellant must demonstrate which party caused the delay and whether such delays were unreasonable. *See Martha*, 407 Mass. at 331. In *Martha*, the SJC held that the mother made no showing that the two continuances requested by the department were unreasonable or attributable to anything but the "thoroughness of the procedures." *Id.* at 331. Moreover, the mother contributed to the delay through her "inability or unwillingness to participate in the service plans drawn up by the department." *Id.* at 330-31. Thus, the delay did not violate due process, even though the trial occurred three years after the care and protection case was filed. *Id.*

In *Adoption of Don*, the parents argued that the delay in the proceedings denied them their due process rights because the termination proceedings did not conclude until approximately five years after the children were removed and the termination trial was conducted over forty-five non-consecutive days. 435 Mass. at 169-70. The SJC disagreed, finding that the extended length of the proceedings was "regrettable," but held that the parents did not prove that the delay was prejudicial to them or that the result would have been different if the proceedings had occurred "more expeditiously." *Id.* at 170.

Moreover, the Appeals Court has suggested that parents must take steps in order to mitigate delays. *Nicoletti v. Bolduc*, 88 Mass. App. Ct. 1112, *2 (2015) (Mass. App. Ct. Rule

1:28). Such steps could range from a parent making an “informal inquiry of the trial judge to filing an action for mandamus.” *Id.* at *2; *see, e.g., Zatsky v. Zatsky*, 36 Mass. App. Ct. 12 (1994) (stating that if a decision seems overdue, the first step a litigant can take is to make inquiry of the trial judge, directly, or through the register’s or clerk’s office); *Skandha v. Clerk of the Superior Ct for Civil Bus. In Suffolk County*, 472 Mass. 1017, 1018 (2015) (describing how the appellant filed a mandamus asking the single justice to direct the clerk of the Superior Court to assemble the record for purposes of his appeal).

B. Bonding between Children and Substitute Caregivers Due to Delays in Trial and/or Delays in Issuing Rulings

When a child is living with foster parents for a long period, bonding typically occurs. *Adoption of Rhona*, 57 Mass. App. Ct. 479, 492 (2003). As the parties wait for trial, “the bonds between the child and his foster parents will [grow] . . . while the tie with the biological [parent] becomes frayed.” *Care and Protection of Bruce*, 44 Mass. App. Ct. 758, 759 n. 4 (1998). Bonding of a child to foster or pre-adoptive parents is a factor in termination proceedings; thus, it prejudices parents. *See* G.L. c. 210, §3(c) (vii); *Adoption of Nicole*, 40 Mass. App. Ct. 259, 262-63 (1996). Accordingly, delay can skew the result against the biological parents. *Bruce*, 57 Mass. App. Ct. at 758 n. 4. Thus, as the SJC noted in *Adoption of Don*, where the outcome of the case might have been different had the proceedings occurred more expeditiously, the delay violates due process. *See* 435 Mass. at 169.

In *Adoption of Rhona*, the period of time from the start of the trial to the entry of findings spanned over three years. 57 Mass. App. Ct. at 486. The trial judge relied in part on the bond between the child and her foster parents as a significant basis for his decision that it was in the child’s best interest to sever all legal relationships with her parents. *Id.* at 492. However, on appeal, the termination order was reversed due to the lack of clear and convincing proof of

current unfitness, the staleness of the findings, the prejudicial delay in concluding the proceeding and pattern of visitation, and the lack of appropriate evidence to determine the child's best interests. *Id.* at 493. In vacating the decree allowing the petition to dispense with consent to adoption as to both parents, the court noted that the parents were prejudiced because the parent-child bond was allowed to continue to deteriorate during a pivotal period in the judicial proceedings. *Id.* at 490. The court further noted that it is "unseemly for the Department to allow the process to drag on, prohibiting contact in the interim, and then argue in support of adoption that bonding has taken place." *Id.* (quoting *Pet. of the Dept. of Social Servs. to Dispense with Consent to Adoption*, 16 Mass. App. Ct. 607, 612 (1983)).

II. Other States' Rulings on Whether Delays in Proceedings Violate Parents' Due Process Rights

A. Indiana

The Court of Appeals in Indiana has held that delay in proceedings may increase the chances that a custodial parent will be deprived of custody and such delay may prejudice his or her right to a hearing so as to deny him or her procedural due process. *See Brown v. Brown*, 463 N.E.2d 310, 314 (Ind. Ct. App.1984); *see also Wilcox v. Wilcox*, 635 N.E.2d 1131 (Ind. Ct. App. 1994).

Indiana courts recognize that, because child custody proceedings implicate the fundamental relationship between parent and child, procedural due process must be provided to protect the substantive rights of the parties. 463 N.E.2d at 313. The legislature has provided a fairly detailed list of procedural requirements for courts to follow in custody and modification cases. *Id.* at 313. In *Brown*, the court transferred custody of two children from the husband to the wife, but the children were made "wards of the court" subject to the supervision of the child welfare department. *Id.* at 312. However, because the procedures were not followed in at least

three instances, the irregularities that occurred in the proceedings constitute an abuse of trial court discretion. *Id.* at 313. One such procedural irregularity includes a two-month delay between granting the emergency order and the hearing. *Id.* at 313. It was noted that a prompt hearing is especially essential in a custody case where the parties are “dueling for a child's affections,” and also pointed out that a delay in the proceedings “may increase the chances of a custodial parent eventually being deprived of custody.” *Id.* at 313.

The Court in *Wilcox* reversed a permanent custody order where a couple divorced, and the mother moved out of state with the couple’s children two days after the divorce was finalized. *Wilcox v. Wilcox*, 635 N.E.2d 1131 (Ind. Ct. App. 1994). Here, the trial court granted the father’s emergency request for temporary custody but did not schedule a custody hearing until over fifteen months later. *Id.* at 1133. During this time, mother was only allowed to have limited supervised visitation with the children, thus essentially denying her access to her children’s lives “before having an opportunity to be heard.” *Id.* at 1136. Notably, none of the delay was attributable to the mother’s actions. *Id.* The appellate court noted that “the delay of fifteen months severely prejudiced mother’s right to a hearing on continued custody so as to deny her procedural due process” and reversed the order granting father permanent custody to the children, ordering that custody be returned to mother pending further proceedings. *Id.* at 1136-37.

In contrast, the same appellate court did not find a due process violation where the trial court scheduled the second day of trial approximately seven months after the first day. *Stratton v. Stratton*, 834 N.E.2d 1146, 1150 (Ind. Ct. App. 2005). In *Stratton*, the trial court modified temporary custody after the first day of trial, after considering a doctor’s psychological evaluation and hearing evidence from both parties. *Id.* at 1150. Thus, temporary custody of the

child was not modified pursuant to an *ex parte* order, and instead the mother was given an opportunity to present evidence before the temporary modification occurred. *Id.* Furthermore, the mother was given parenting time with the child as provided in the Indiana Parenting Time Guidelines; therefore, the mother was “not denied meaningful contact” with the child during the delay. *Id.* Hence, the court did not find that the trial court committed reversible error in scheduling the second day of trial seven months after the temporary modification of custody. *Id.*

B. Oklahoma

Oklahoma has noted that due process is implicated in termination proceedings. *In the Matter of E.H. and J.H.*, 429 P.3d 1003, 1009 (2018). Before any deprivation can occur, a fundamental requirement of due process must be satisfied: the opportunity to be heard in a meaningful time and in a meaningful manner. *Flandermeyer v. Bonner*, 152 P.3d 195, 198-99 (Okla. 2006). However, due process is flexible and calls for such procedural protections as the particular situation demands. *Id.* Thus, before a party’s due process rights are violated, Oklahoma holds that it must be shown that the action or error was arbitrary, oppressive, and shocking to the conscience of the court. *Id.* Additionally, Oklahoma has found that the passage of time alone does not establish an unconstitutional delay or a violation of due process. *In the Matter of E.H. and J.H.*, 429 P.3d at 1009; *see also Simpson v. State*, 275 P.2d 272 (Okla. Crim. App. 1982) (holding a three-month delay in bringing defendant to trial did not warrant dismissal due to being minimal and not prejudicing the defendant).

In determining whether a mother had been denied procedural due process, the Oklahoma Court of Civil Appeals engaged in a two-step inquiry: asking whether the mother possessed a protected interest to which due process protection applies, and, if so, whether the mother was afforded an appropriate level of process. *E.H. and J.H.*, 429 P.3d at 1009; *See also In the Matter*

of *A.M. and R.W.*, 13 P.3d 484, 487 (Okla. 2000) (using the same two-step analysis in a termination of parent rights case to find that the exclusion of the mother from the courtroom while the child testified did not violate her procedural due process rights). Here, the children disclosed sexual abuse by the father to the mother, and the mother allowed the father to continue seeing the children. *Id.* at 1006. In this case, the first step in the inquiry is clear: in the context of a proceeding to terminate parental rights, parents have a constitutionally protected liberty interest in continuing the legal bond with their children. *E.H. and J.H.*, 429 P.3d at 1009.

The second step of the inquiry must be determined on a case-by-case basis in which the court assesses whether the parent was afforded an appropriate level of process. *Id.* The Court uses three factors: the private interest affected by the state's action, the risk of erroneous deprivation posed by the procedures employed and the probable value, if any, that additional or substitute procedures would provide, and the government interest at stake. *Id.* The procedure employed in this instance was the delay in the adjudication hearing, and ultimately the risk of deprivation posed by this procedure was outweighed by the risk of substantial harm to the children. *Id.* at 1009-10. Moreover, the mother was represented by counsel at trial and had the opportunity to cross-examine the witnesses and put on her own case, and so she had a meaningful and fair opportunity to defend herself. *Id.* at 1010. Therefore, the Court held that the delay in the adjudication hearing did not violate the mother's due process rights. *Id.*

C. Kansas

Kansas took a different approach when faced with the argument that a delay in scheduling trial in a termination of parental rights case violated a father's due process rights. *See In re B.H.*, 32 Kan.App.2d 12, 13 (2003). The father asserted that he was denied his right to

parent his children from when the children were removed until severance,¹ over two years later. *Id.* The Kansas Court of Appeals noted that resolution of this issue involved a determination of whether the procedural language of two sections in the Kansas Code for Care of Children are “mandatory or directory.” *Id.* One section states the order of disposition may be entered at the time of the adjudication, but shall be entered within thirty days following adjudication, unless delayed for good cause; the second states that those listed shall file pleadings alleging parent is unfit and requesting termination of parental rights within thirty days after the court has determined reintegration is not a viable alternative and that the court shall set a hearing on such pleadings within ninety days of the filing. *Id.* When looking at said language, the Court determined that the time limits in such cases are directory, not mandatory. *Id.* at 16.

The Court also found that when the state seeks to terminate the relationship between a parent and child, it must do so by fundamentally fair procedures that meet the requisites of due process. *Id.* at 16; *In re J.L.D.*, 14 Kans. App. 2d. 487, 490 (Kans. App. 1990). Hence, the question is what process is due. *Id.* In answering this question, the Court stated that due process is not a static concept; rather, its requirements vary to assure the basic fairness of each particular action according to its circumstances. *Id.* It held that the record did not show that the father’s due process rights were violated because many of the delays were either requested, agreed to, or caused by the father and some were made by the court to give the father more time to comply with the goals of integration; in addition, father was not prejudiced by any delays. *Id.*

CONCLUSION

To successfully argue that a delay in termination proceedings violates due process, the parents must not have contributed to the delay. They should also take steps to mitigate the delay

¹ See *id.* for definitions of terms used in Kansas child welfare proceedings.

whenever possible; that is, they should move for the court to expedite proceedings. Parents must show that any delay was “unreasonable,” and that the Department and the court “allow[ed] the process to drag on.” Finally, parents must be able to show that the delay was prejudicial: that the outcome of the case would have been different had the delay not occurred. To show prejudice, parents should present evidence about the deterioration of the parent-child bond or the detriment of bonds with substitute caregivers.